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No. 90-1804

In the
Supreme Court of the United States

OCTOBER TERM, 1990

PAUL E. QUIRK AND BEATRICE QUIRK,
PETITIONERS,

v.

TOWN OF SANDWICH,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT
OF MASSACHUSETTS

Brief in Opposition to Petition for Writ of Certiorari

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Questions Presented

I. Did the Massachusetts Supreme Judicial Court err in finding that a municipality's action in obtaining a final decree foreclosing all rights of redemption to certain land was an act of ownership sufficient to break the continuity of the petitioners' adverse possession?

II. Did the Massachusetts Supreme Judicial Court's decision based on common law and legislative intent implicate the petitioners' constitutional rights?

III. Was there a federal issue or constitutional question reserved below for review by this Court?

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Statement

I. BACKGROUND

The respondent Town of Sandwich obtained final decrees in the Massachusetts Land Court in the 1970s on four parcels

of land on which the record owners had failed to pay their taxes. At the time, the petitioners were occupying some of the land in question as adverse possessors without a claim of title. It is not clear what portion of the land was occupied by the petitioners nor for how long as that issue was not reached at trial. The trial judge allowed the Town's motion in limine to exclude evidence of adverse possession on the theory that the final decrees in the 1970s had cut off the petitioners' adverse possession and petitioners did not claim the requisite twenty years before the issuance of the final decrees nor had sufficient time passed between the final decrees and the filing of a writ of entry in the trial court (Pet. App. A17 to A25).

The trial judge analogized the procedure for obtaining the final decrees to a petition for registration which, in Massachusetts by statute, cuts off adverse possession. The trial court ruled that the filing of the land court petitions by the Town in the 1970s which included notice to all the world, recording in the Registry of Deeds, notice to record owners and others with an interest, investigation by the land court, a hearing and the issuance of a final decree foreclosing all rights of redemption was an "effective assertion of the rights of the Town of Sandwich which as a matter of law concluded use of the land adversely by the defendants." (Pet. App. A23 to A24.)

The petitioners appealed the final decision and judgment of the trial court to the Massachusetts Supreme Judicial Court. There were no constitutional issues addressed either by the trial court or the Supreme Judicial Court. The petitioners made no separate argument below based on constitutional rights or the Town's rejection of their attempt to pay taxes on the subject property to which they apparently knew they did not have record title (SJC decision, fn. 4, Pet. App. A4 to A5).

II. The Supreme Judicial Court (SJC) Decision.

The SJC stated that the land court's comparison of the foreclosure of the right of redemption to a petition to register the land was instructive but not conclusive (Pet. App. A9). The SJC based its affirmation of the trial court's judgment on a public policy determination based on legislative expressions of policy (Pet. App. A10). The SJC analyzed several statutes in its decision and stated that the State Legislature's purpose was that an adverse possessor's rights should be subordinate to those of a municipality, as the adverse possessor, for all intents and purposes, is a trespasser (Pet. App. A11 to A12). The SJC held that when, as in this case, land had been taken for taxes and the right of redemption had been foreclosed, the title was cleared in the name of the municipality. The SJC relied on decisions in other jurisdictions that justified the common law rule that time does not run against the sovereign. The court stated that there were valid public policy reasons for that policy in order to preserve public rights and property from damage and loss through the negligence of public officers (Pet. App. A15).

The Massachusetts Supreme Judicial Court considered on appeal only the issue on which the trial judge had rejected the adverse possession claim, which was the only issue the petitioners had argued that the SJC needed to decide (Pet. App. A4, fn. 4). The SJC, in its opinion, considered whether as a matter of law the Town's tax taking followed by the foreclosure of the record owners' rights of redemption interrupted the running of the twenty year period of adverse possession. The SJC made its decision as a public policy determination based on common law precedent and the interpretation of legislative intent. Constitutional issues were not addressed by the SJC in its decision.

The SJC, in making its determination, stated the common law rule that "traditionally no significant equities have been

recognized in favor of an adverse possessor, one who is a trespasser." (Pet. App. A12.) The public policy question decided by the SJC was whether the court should recognize and enforce as an ownership right the years of adverse possession that the Quirks had been able to accumulate when the Town sought and obtained the Land Court's final decree. The court decided that it should not. It was a matter of the public interest to recognize the Town's clear title on issuance of the final decrees (Pet. App. A12 to A14). The SJC agreed that the Town had performed sufficient acts of ownership in the 1970s to cut off adverse possession and to clear its title to the land.

Reasons for Denying the Petition

No constitutional issue or federal question is raised by the petitioners. Adverse possession is a common law concept modified in part in each state by statute. Massachusetts courts and the common law have always treated adverse possessors as wrongdoers who are mere trespassers on the true owner's land until they have held the land under non-permissive use which is actual, open, notorious, exclusive and adverse for twenty years. *Senn* v. *Western Massachusetts Electric Co.*, 18 Mass. App. Ct. 992, 471 N.E.2d 131 (1984), *rev. den.*, 393 Mass. 1105, 474 N.E.2d 181 (1985). *See also Baumrin* v. *Cournoyer*, 414 F.Supp. 326 (D.C. Mass. 1976). If any one of the essential elements of adverse possession is left in doubt by the claimant's proof, the claimants cannot prevail. *Mendonca* v. *Cities Service Oil Co.*, 354 Mass. 323, 326, 237 N.E.2d 16 (1968). Absent a showing of an actual, open, notorious, exclusive and adverse possession for twenty years, right to land in adverse possession is not established. *Wonson* v. *City Manager of Gloucester*, 1 Mass. App. Ct. 880, 307 N.E.2d 351 (1974).

In the instant case, the Land Court and the Supreme Judicial Court on appeal relied on legislative intent and interpretation of the common law to reach the conclusion that the element of exclusive possession of the four plots of land in question by the petitioners had been broken by the respondent's acts of ownership in the early 1970s, when the Town went through the legal process of obtaining final decrees from the Land Court, foreclosing all rights of redemption to the land. The petitioners were trespassers before that time and continued to be trespassers after that time. The Quirks did not claim that they had held possession adversely for twenty years before the Town's exercise of its rights in the 1970s cut off their adverse possession. The period between the final decrees and the petition for the writ of entry also did not meet the twenty year requirement (Pet. App. A20 to A21). It was on this basis that the courts below decided in favor of the ownership of the land by the Town of Sandwich.

In their petition to this Court, the petitioners now claim issues of constitutional dimension. Their claims of violation of due process implicate fifth and fourteenth amendment protections of property rights. Yet, as trespassers the petitioners had no property rights in the four lots in question. The petitioners were wrongdoers, they were trespassing on land whose ownership was secured and whose title was cleared in the name of the Town of Sandwich in the 1970s. The petitioners never completed their adverse possession. They never owned the land. The Massachusetts Supreme Judicial Court agreed with the trial court that the due process followed by the Town in the 1970s to clear title to the land was a sufficiently significant act of ownership by the new true owners to cut off the exclusive possession held up to that date by the petitioners. There is a long established common law requirement that in order to adversely possess someone else's land, the possession must be exclusive and an act of ownership by the true owner is sufficient

to cut off any inchoate rights. Once those rights were cut off in the 1970s the adverse possession did not meet the required twenty years before the Town brought its action for a writ of entry in the courts below.

The petitioners' claim of an illegal taking of property by the Town has no support in fact or in law. The Town, the owner of the property, did not take the land from the petitioners. Earlier, the Town had obtained it from the rightful owners for non-payment of taxes after following a long and complicated statutory process which included notice and a hearing leading to the final decrees foreclosing all rights of redemption.

The petitioners claim that they, not the rightful owners, should have been billed for the taxes. That is a specious argument since the petitioners had no claim of title to the land at the time and if the taxes had been paid by the petitioners that would only have protected the rights of the true owner and not secured any rights to the petitioners. The petitioners admitted to actual knowledge of the tax notices although they were not themselves served (Pet. App. A4).

The petitioners also claim that state statutes recognize the adverse possessor's property rights. They improperly rely on Massachusetts General Laws Chapter 237, § 16 (Pet. App. A11 and A40) which permits an adverse possessor to recover for improvements to the land possessed for six years. This statute does not grant the adverse possessor property rights in the fee after six years but merely allows the adverse possessor as a defendant in a writ of entry suit to compensation for the value of any buildings or improvements made on the land by him. This would, of course, be offset by any damages or rents owed for illegally occupying the land. The issue of any such damages in this case, however, has not yet been addressed. The damage hearing was separated in the court below and a separate hearing will be scheduled to hear the damage claims in this case.

The petitioners, throughout their brief in support of this petition, argue that they were entitled to notice and a hearing in the 1970s when the Town was in the process of clearing title to the land. That too is a specious argument when the court considers that even if evidence had been presented to the court to show adverse possession starting in 1965, a fact disputed by the Town and not reached at trial, the petitioners had no legal claim to the land in the 1970s and thus no property right requiring a notice and hearing. Even granting the petitioners the full benefit of all of their claims, they had not been on the land for twenty years when the Town went to court to obtain the final decrees and in fact were trespassing on property then claimed by the municipality.

The petitioners also made an equal protection argument claiming that the court's decision gives greater protection to the municipality than to a private owner. This is equally untrue. Both a private owner and the municipality are free to take advantage of the common law rule that the disturbance of the exclusive control of the land by the adverse possessor cuts off the adverse possessor's rights. In the instant case, the court has determined that the tax taking followed by the procedure leading to the issuance of the final decrees was such an action.

The common law has always recognized the rights of the sovereign and provided greater protection for the public good than that provided to an individual landowner in cases of adverse possession (Pet. App. A22 to A23). Such protection of the public interest does not implicate the equal protection clause of the constitution.

The SJC addressed the public policy common law, and legislative intent issues implicated in the Land Court's decision to recognize the municipality's right to the land in question. The Supreme Judicial Court confirmed the trial court's interpretation of state law and denied the petitioners' right to the land on which they had not met the legal requirements of twenty

years of exclusive control. There were no federal questions and no constitutional issues addressed in the court below.

Conclusion

The petition for writ of certiorari should be denied.

Respectfully submitted,

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